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No. 464

In the

Supreme Court of the United States

OCTOBER TERM, 1965

LLOYD A. FRY ROOFING COMPANY,

Petitioner,

vs.

VOLASCO PRODUCTS COMPANY,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

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Petitioner, Lloyd A. Fry Roofing Company, prays that this Court grant rehearing of its order of November 8, 1965 denying the Petition for Writ of Certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit* in the above-entitled cause as prayed for in the petition filed August 17, 1965 in this proceeding.

* The Sixth Circuit's opinion is officially reported at 346 F. 2d 661.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

1. Subsequent to this Court's order of November 8, 1965 denying the Petition for Certiorari herein, this Court by order dated November 15, 1965, granted a petition for certiorari in the case of *Utah Pie Company* v. *Continental Baking Company, et al.*, Case No. 489, October Term 1965. The decision of the Court of Appeals for the Tenth Circuit in the *Utah Pie* case, 349 F. 2d 122, is in direct conflict with the decision of the Sixth Circuit in the instant case on the principal and essentially identical question of anti-trust law raised in both proceedings.

In the *Utah Pie* case the Tenth Circuit ruled that evidence of a decline in market share on the part of a single local manufacturer doing business in a multi-competitor market, and depressed price levels within that market did not suffice to sustain plaintiff's burden of proving that competition has been or may be injured as is required by Section 2(a) of the Amended Clayton Act in a primary line geographic price discrimination case. In the instant case the Court of Appeals for the Sixth Circuit ruled that evidence of a drop in sales volume (no evidence of market shares was presented) and profits on the part of a single local manufacturer in a multi-competitor relevant market was sufficient to sustain the required competitive injury element of a geographic price discrimination case. Thus, in both cases injury criteria focused entirely upon the experience of a single competitor in a multi-competitor market was present, and the two Court of Appeals reached exactly opposite results in passing upon the sufficiency thereof to sustain a jury's verdict.

2. The striking similarity between these two cases is immediately apparent when the salient facts and primary question presented in the *Utah Pie* petition for certiorari

are set forth *verbatim* and the corresponding facts in the case at bar set forth immediately opposite them. The petition in *Utah Pie* states:

> "a. That petitioner was a small corporation, with limited financial resources, engaged solely in the business of making fresh and frozen pies, which it sold in the inter-mountain area, where it had the only pie plant;" [Identical situation as to asphalt saturated felt in the Knoxville, Tennessee area.]
>
> "b. Respondents were all large corporations, each engaged in a variety of businesses of which its frozen pie business was a small part;" [Identical situation except that only one defendant, whose business was confined to asphalt roofing products, was named.]
>
> "c. Respondents all had substantial resources in the form of multi-million dollar over-all profits;" [Identical situation.]
>
> "d. Respondents all distributed frozen pies throughout all or most of the United States;" [Identical situation.]
>
> "e. Respondents all sold substantial numbers of frozen pies in the area in which they competed with petitioner at prices below the prices which respondents charged for pies of like grade and quality in areas in which they did not compete with petitioner;" [Identical as to prices, but in the instant case no proof was offered as to Fry's quantum of sales in the relevant area.]
>
> "f. Respondents had net losses on their sales of frozen pies in the area in which they did compete with petitioner;" [Identical, except in the case at bar petitioner challenges the competency of the evidence on this point.]
>
> "g. Prices in petitioner's trading area fell and petitioner's market share declined." [Identical as to

prices, but in the instant case Volasco never attempted to prove a decline in market share but confined its evidence to a drop in its own sales volume.]

"The questions presented are:

1. Are these facts alone sufficient to sustain a jury's verdict finding a reasonable likelihood of a substantial lessening of competition or a tendency to create a monopoly arising out of respondent's price discriminations?" *

This Court's attention is also respectfully invited to the reply brief filed by the Utah Pie Company in support of its petition, which is devoted primarily to demonstrating the irreconcilability of the two decisions under discussion. Thus, it is stated at pages 7-8 of that reply brief:

> "Here, as in *Volasco*, the case went to the jury both on a conspiracy theory and as a price-discrimination case irrespective of conspiracy. In each case, the jury found a violation of section 2(a) of the Robinson-Patman Act, but no conspiracy. In Volasco, there was evidence that there were other competitors besides Volasco Products Co. in the market, but apparently no evidence of market shares, and thus no evidence of the impact of the discrimination on anyone but the plaintiff Volasco. Here, the evidence clearly showed that sales in the Utah Pie trading area were almost exclusively made by petitioner and the three respondents in the relevant period; sales by 'others' were *de minimis*. (Pl. Ex. 64, p. 5; D. Ex. PA-27). Again, this case has strong evidence to support the verdict which the Tenth Circuit overturned, where the *Volasco* case, affirmed by the Sixth Circuit, had little or none.

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* All quoted material appears at pages 2-3 of Utah Pie Company's petition for certiorari of August 23, 1965 (Case No. 489). Record citations supporting the statements in brackets appear on pages 2 through 6 of the Petition previously filed herein.

"Respondents suggest that the facts of this case are unique and cannot be compared to the facts of any other case. The suggestion is tantamount to abandonment of the rule of law (as well as an acknowledgment that the Tenth Circuit has grossly abused its scope of appellate review by deciding fact questions). There are facts which by themselves suffice to take a case to the jury as a matter of law. Those operative facts, as they appear in the opinion of the Sixth Circuit in *Volasco,* are the discriminatory price itself, some evidence that the price was below cost, and evidence of impact upon the plaintiff. As petitioner has shown in its petition in this case, there is evidence to support all of the ultimate facts which the Sixth Circuit held sufficient to warrant submission of the *Volasco* case to a jury, as well as important evidence of each respondent's predatory intent apparently *not* present in *Volasco.*

"Petitioner believes that the decision of the Sixth Circuit was correct and that of the Tenth Circuit incorrect. However, for the purposes of this petition for certiorari, it is sufficient to note that these two circuit court decisions, on matters of law—as indeed appellate review must be limited to matters of law—are in clear conflict, and the conflict requires resolution by this court."

Petitioner will not burden this Court with a reiteration of reasons why the issue presented herein is of sufficient importance so as to warrant review by this Court, since the decision to accept the *Utah Pie* case clearly indicates this Court's cognizance of the far-reaching implications of a pronouncement delineating the scope of the statutory requirement of "effect upon competition".

Petitioner would, however, stress that there is a twofold advantage should the Court accept both cases for *simultaneous* review. In the first instance, speaking strictly

from this petitioner's viewpoint, should this Court uphold the decision of the Tenth Circuit in the *Utah Pie* case which, according to the petition filed therein, contains far stronger evidence supporting the jury's verdict than that in this case, it is clear that the Sixth Circuit's decision against this petitioner should not stand. Petitioner, therefore, seeks review, so that it will not be in the unenviable position of having a verdict against it sustained by virtue of a decision which would be clearly erroneous under a later decision of the Supreme Court.

Secondly, and speaking from a less self-centered standpoint, simultaneous review of these cases may well afford this Court an opportunity to draw a clear-cut and meaningful guideline to future antitrust litigants with regard to just what evidence concerning effect on competition is essential to sustain a verdict in a geographic price discrimination case. In *Utah Pie,* the evidence submitted to the jury included meaningful and complete statistics as to sales volume, prices, and market share of each important competitor in the market involved therein, while in the case at hand the record was left in a void state concerning all these points with the sole exception of evidence pertaining to plaintiff, *Volasco.* Thus, in *Utah Pie* the jury was afforded a basic foundation of fact concerning the state of competition in the market place from which it could draw inferences as to the possible impact thereon of the several defendant's price discriminations. The Sixth Circuit's opinion herein sanctions a jury verdict where this class of evidence is totally lacking and, therefore, authorizes jury speculation in this critical area.

Lastly, in the *Utah Pie* case, according to the petition, strong evidence of predatory intent on the part of the discriminators was placed before the jury. In the case at bar plaintiff sought to have the jury infer predatory intent on the basis of below-cost selling, but the Court of Appeals refused to rule whether Volasco's evidence on this point was competent, holding flatly that evidence of below-cost selling (i.e., predatory intent) was unnecessary. As to both these points, this Court can draw a line of demarcation should it accept these cases for simultaneous review.

CONCLUSION

For the reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

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